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No. 10-37

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHAEL HALL,
Petitioner,

v.

RICK THALER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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CAPITAL CASE

INTRODUCTION

As Petitioner and its supporting amici have explained, there has been a wealth of confusion in the lower courts about how to implement this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Pet. at 21-23; *Amicus* Br. of AAIDD at 13-15. The decision below concerns the particularly extreme and incorrect interpretation of *Atkins* that the state and federal courts in Texas have adopted. Under Texas's approach, a defendant cannot claim the protection of *Atkins* where a court concludes that an otherwise sufficient showing of a low IQ and accompanying adaptive deficits "could have" resulted from environmental factors, such as a traumatic childhood, rather than from low intelligence. Pet. App. 103a-05a.

Texas's interpretation of *Atkins* is wrong because the clinical definition of mental retardation recognizes that the condition has multiple etiologies, including environmental influences relating to family interactions and upbringing. To ask whether a 67 IQ score like Hall's was caused by low intelligence or years of an abusive childhood is simply the wrong inquiry under clinical standards. And to ask, as the lower courts did here, whether environmental factors "could have" contributed to a facial showing of mental retardation is to ensure that *Atkins*'s protections will be unavailable in essentially every case given the ubiquity of such factors.

Apparently recognizing the illegitimacy of the reasoning employed below, Respondent strains to

recast the lower courts' determinations as embracing the very clinical standards that the opinions reject. As we explain, Respondent's reformulation neither accurately states the rule of law followed below nor is an intelligible interpretation of *Atkins* in its own right. Respondent also cannot explain away the substantial disagreements the lower courts have reached in answering these questions. This Court's review is warranted to put an end to that confusion, and, in particular, to correct Texas's failure to implement *Atkins* meaningfully.

I. THE INTERPRETATION OF *ATKINS* ADOPTED BELOW IS INCORRECT AND CONTRIBUTES TO LOWER COURT CONFUSION.

1. Respondent makes no effort to defend the reasoning the lower courts actually employed to discount Hall's low IQ score. Dr. Mark Cunningham tested Hall in 2000, the time of the crime and trial, and found Hall's measured full-scale IQ score to be 67. Pet. App. at 17a, 82a. The federal habeas court discounted this score based on "evidence that Hall's home and social environments and his emotional state *could have* artificially lowered some of Hall's IQ scores." *Id.* at 103a (emphasis added). As Hall explains in his Petition, the court erred because the clinical definitions of mental retardation contemplate multiple etiologies, including environmental factors such as family poverty, domestic violence, and insufficient educational opportunities—precisely the situations about which evidence was introduced in this case. Pet. at 27; *see also* Am. Ass'n on Intellectual and Developmental Disabilities,

Intellectual Disability: Definition, Classification, and Systems of Supports (11th ed. 2010) ("*AAIDD 2010 Definition*"); *Amicus* Br. AAIDD at 8-10.

The lower courts' approach is not only wrong as a matter of clinical understanding, but also pernicious. It turns *Atkins* on its head, taking the indicia that are clinically recognized causes of low IQ and instead viewing them as disqualifications. Because environmental factors like those in Hall's upbringing are commonly found in capital cases and are often presented as mitigation evidence, the lower courts' approach would make it near impossible for many capital defendants to support an *Atkins* claim. *See, Wiggins v. Smith*, 539 U.S. 510, 535 (2003); *see also Porter v. McCollum*, 130 S. Ct. 447, 449 (2009); *Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Penry v. Lynaugh*, 492 U.S. 302, 309 (1989) While this Court left to states the task to implement *Atkins*, 536 U.S. at 317, an "implementation" that vitiates the protections described there is surely invalid. *Ford v. Wainwright*, 477 U.S. 399, 405, 416-17 (1986).

Apparently recognizing that the lower courts' reasoning is indefensible, Respondent substitutes new reasoning of his own. On Respondent's account, although environmental factors can sometimes be a legitimate cause of low IQ, at other times, they merely "lead to a low score not related to low intelligence." Opp. at 29. Here, Respondent argues, the district court made just such a finding, determining that environmental factors lowered "not Hall's intelligence but his test scores," making those scores unreliable. *Id.*

This line of reasoning appears nowhere in the lower courts' opinions, which gave no acknowledgment that environmental factors could ever be a cause of mental retardation, and never made any finding that in this case such factors had caused Hall to perform on the test in a way that led to an unreliable score. In fact, in this case, the state's expert, Dr. Price, testified that the IQ score of 67 was the best indication of Hall's measured IQ at the time of the crime and trial, Pet. App. at 334a; that Dr. Cunningham had properly administered and scored that IQ test, Fed. Habeas Hr'g Tr. at 237:4-10;[1] and that on a test of adaptive skills administered by Dr. Price two weeks after the IQ test, Hall had been cooperative and had put forth good effort, *id.* at 238:11-24. In short, the lower courts did not find that environmental factors could cause a low IQ, but here instead somehow led to an unreliable score. Rather, they summarily dismissed a low IQ score as unreliable based on the supposition that environmental factors might somehow have led to a lower score than Hall might have achieved had he not been exposed to those factors.

In any event, even if it bore any relevance to the analysis here, Respondent's new approach is no better than the one actually employed by the lower courts, because Respondent's proffered distinction between a "low [IQ] score and low intelligence," Opp. at 29, is untenable. Such a distinction necessarily posits some form of actual intelligence apart from

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[1] Petitioner's Petition mistakenly cited the Petitioner's Appendix for this portion of the hearing transcript, which in fact does not appear in the Appendix.

what is reflected on a properly administered IQ test. This distinction is contrary to clinical definitions of mental retardation, which explicitly incorporate IQ scores. *Atkins*, 536 U.S. at 308 n.3. "Although far from perfect, intellectual functioning is currently best represented by IQ scores when they are obtained from appropriate, standardized and individually administered assessment instruments." *AAIDD 2010 Definition* at 31. Indeed, "[g]eneral intellectual functioning is a phenomenon measured, *and thus defined*, by intelligence tests. It is, therefore, quantifiable as an intelligence quotient (IQ) score." James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 422 (1985) (emphasis added).

Moreover, such a distinction would be completely unworkable as part of a clinical diagnosis, much less a legal standard. If the legal standard described in *Atkins* is not grounded in objective IQ scores, it will be quickly drained of any substance.[2] *See, e.g.*, *AAIDD 2010 Definition* at 32-34 (describing debate over meaning of intelligence). And again, given that so many defendants facing the death penalty have had traumatic upbringings, few defendants will be able to take advantage of *Atkins*'s protections if courts may dismiss IQ scores based simply on a showing of troubling environmental factors.

To be sure, not all IQ tests are properly administered. If a score is unreliable because, for

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[2] As amici point out, IQ scores anchor, but do not exhaust, the inquiry into general intellectual functioning—clinical judgment is still essential. *Amicus* Br. AAIDD at 5-6.

example, the clinician is not qualified or showed bias in testing or scoring, that score may not offer probative evidence of mental retardation. Likewise, where there is evidence that a test subject malingered or was acutely ill or depressed in a manner that would detract from his or her ability to perform on the test, that score would likewise be questionable. But where, as here, there is no allegation of improper administration, or evidence of malingering or acute factors that affected the subject's ability, a court has no reason to depart from an objective IQ score based on speculations about the subject's "true" intelligence.

2. Respondent's argument about adaptive limitation suffers from analogous flaws. As with the IQ inquiry, the lower court discounted evidence of adaptive deficiencies because of the possibility that they were due to environmental factors. This leads to the same pernicious result—that environmental factors put forward as mitigating evidence, and present in many capital cases, make it impossible to raise an *Atkins* defense.

Respondent contends that the lower courts were correct to hold that adaptive deficits caused by environmental factors do not count, but the claim does not bear scrutiny. Respondent concedes that environmental factors may lead to mental retardation. *See supra*. And, indeed, the adaptive deficit analysis is relevant only for those defendants who have an IQ score that is within the mentally retarded range. Among those defendants with low IQ, Respondent would have courts somehow distinguish between environmental factors that lead

to mental retardation manifested in adaptive deficits, and environmental factors that lead to adaptive deficits unrelated to mental retardation.

Unsurprisingly, this is an impossible task. As the State's expert conceded in response to the district court's inquiry, he "knew of no way to distinguish between adaptive deficits caused by low intelligence and those caused by the environment." Opp. at 17; *see also* Pet. App. at 335a (state's expert testifying that Hall had "adaptive behavior deficits . . . related to both his low intelligence and his adjustment problems" and that from a "scientific point," he knew of no way to separate out the causes); *id.* at 337a (state's expert testifying that "I don't know a way to separate . . . out" the "causes" of Hall's adaptive deficits).

Likewise, clinical standards do not require the nexus that the Respondent proposes, precisely because there is no meaningful way to separate out the causes of adaptive deficits, especially when an individual has limited intellectual functioning and when environmental factors are present. *See AAIDD 2010 Definition* at 58-61. Consequently, neither of the clinical definitions cited in *Atkins* requires a showing that adaptive deficits "arise" from subaverage intelligence rather than from other sources. The APA defines mental retardation as "significantly subaverage intellectual functioning . . . *accompanied* by significant limitations in adaptive functioning," all occurring before the age of 18. *Atkins*, 536 U.S. at 308 n.3 (emphasis added) (internal quotation marks omitted). Similarly, the AAIDD defines mental retardation as "significant

limitations both in intellectual functioning and in adaptive behavior." *AAIDD 2010 Definition* at 6.[3]

Given that there is no way to separate out the causes of adaptive deficits, Respondent's argument—that Hall seeks to "shift the burden of proof," Opp. at 31, in arguing that he is not required to prove that his adaptive deficits were caused by intellectual impairments—is simply disingenuous. When there is no clinically accepted method of determining whether adaptive deficits are caused by low intelligence, the rule applied by the lower courts erects an insurmountable burden of proof for an entire category of individuals, like Hall, who suffer from a traumatic upbringing as well as low intelligence. Notably, Respondent mischaracterizes what the lower courts actually did here—they did not merely require that Hall demonstrate that his adaptive deficits were related to his low intelligence, *see id.*, but rather required Hall to demonstrate that low intelligence was the sole cause of his adaptive deficits. *See* Pet. App. at 104a-05a ("There is a possibility that Hall has adaptive functioning deficits that are related to low intelligence, but the court is unable to find from the evidence the degree to which that is so as distinguished from the degree to which whatever deficits Hall might have are related to [environmental factors].").

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[3] The predecessor to the AAIDD, the American Association on Mental Retardation, defined mental retardation as "significantly subaverage intellectual functioning, *existing concurrently* with related limitations." *Atkins*, 536 U.S. at 308 n.3 (emphasis added) (internal quotation marks omitted).

Where, as here, Hall has established limitations in intellectual functioning as well as adaptive deficits, there is simply no dispute that he meets the clinical definition of mental retardation. Respondent's argument to the contrary is not only inconsistent with that definition, but also would require defendants to come forward with proof of a causal relationship that cannot be proven.

3. Contrary to Respondent's assertions, there is substantial disagreement in the lower courts on these very issues. Respondent contends that the lower courts uniformly subscribe to the principle that "mental retardation can arise from environmental factors." Opp. at 33. That claim is false, and obviously so. First, as already demonstrated in this case, Texas does not adhere to that view and instead finds that the presence of environmental factors foreclose *Atkins*. Second, as discussed in the Petition, several other jurisdictions reject that reasoning, just as they reject the slightly recast form that Respondent now offers. *See also Amicus* Br. of AAIDD at 13-15 (discussing jurisdictions have departed from a clinical definition of mental retardation). Respondent's own description of the cases proves the point. For example, citing Oklahoma's decision in *Lambert v. State*, Respondent acknowledges that case held that an "individual's adaptive deficits need not arise from or be related to his intellectual deficits." Opp. at 31 (citing 126 P.3d 646, 651 (Okla. Crim. App. 2005)). That is the opposite of Respondent's position that "Texas law require[s] that the adaptive deficits arise from the intellectual impairment." Opp. at 28.

Likewise, Respondent cannot explain away the Eleventh Circuit's decision in *Holladay v. Allan*, which it acknowledges rejected expert testimony that the defendant's IQ was low "for reasons other than mental retardation—i.e., a learning disability and a poor home environment." Opp. at 32 (citing 555 F.3d 1346 1358 (11th Cir. 2009)). In this case, the lower courts and Respondent contended that Hall's low IQ did not count for precisely the same types of reasons. *See* Pet. App. at 103a; *see also Morrow v. State*, 928 So. 2d 318, 320 (Ala. Crim. App. 2004) (recognizing that adaptive deficits can be caused by both low intelligence and home environment). And on the other side of the ledger, Mississippi joins Texas as a jurisdiction that does discount evidence of adaptive deficits when these deficits may have been caused by environmental factors. *Doss v. State*, 19 So. 3d 690, 710 (Miss. 2009) (relying on testimony that defendant's adaptive deficits were "better explained by his chaotic upbringing than by intellectual deficits" in affirming trial court's determination that defendant was not mentally retarded).

The differences in how these jurisdictions apply *Atkins* cannot be reconciled by Respondent's claim that they all subscribe to the view that mental retardation can be caused by environmental factors. Were that the case, Texas, like the Eleventh Circuit, would not have found that the presence of environmental factors such as a traumatic home life cut against crediting a sub-70 IQ score. And Texas, like Oklahoma, would not have concluded that *Atkins* requires the defendant to prove that his adaptive deficits relate to low intelligence. Only this

Court can authoritatively address these different and dispositive interpretations of *Atkins*.

II. RESPONDENT'S ARGUMENTS REGARDING *BRISENO* HIGHLIGHT THE NEED FOR REVIEW.

As the Petition explains, Texas law as set out in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), under which Hall's federal case was decided, departs impermissibly from the clinical standard mandated by *Atkins*. Respondent offers three arguments that the Court should nevertheless deny certiorari. None is compelling.

First, Respondent argues that *Atkins* does not require state law to accord with clinical definitions. Opp. at 33-34. But *Atkins* requires precisely that, Pet. at 24-25, and there is disarray in lower courts on the issue, *id.* at 35-36. Respondent's argument therefore serves only to highlight the need for this Court to offer clarity.

Second, Respondent argues that while *Briseno* does not "track the approach of the AAMR or the APA exactly," it nevertheless is grounded in a clinical understanding. Opp. at 34. Here, too, Respondent is wrong, Pet. at 28-31, as demonstrated by the considerable criticism leveled against *Briseno* for its reliance on lay testimony to answer questions focused on stereotypes about mental retardation that have nothing to do with a clinical assessment, *id.* at 34-35; *see also* AAIDD *Amicus* Brief at 21-26. Again, Respondent's argument underlines the need for this Court to assess whether *Briseno* impermissibly compromises *Atkins*'s protections.

Finally, Respondent argues that the *Briseno* factors "played no part" in the lower courts' decisions. Opp. at 34-35. However, the federal habeas court was required to evaluate Hall's *Atkins* claim under state law, and it explicitly stated that Hall had not shown subaverage mental function or adaptive deficiencies as contemplated under "Texas' *Atkins* test for mental retardation." Pet. App. at 102a, 103a. That statement was made in a decision issued after a remand by the Fifth Circuit, which directed the district court to test Hall's claim that he was "retarded under Texas' *Atkins* test for mental retardation announced in *Ex Parte Briseno*." *Id.* at 117a. Further, the district court evaluated lay testimony related to Hall's adaptive strengths, rather than focusing on clinical diagnoses of adaptive deficiencies, which is precisely the danger when courts apply the *Briseno* framework. Pet. at 31-33.

CONCLUSION

The petition for a writ of certiorari should be granted.

September 28, 2010

Respectfully submitted,

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